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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Natural mineral resources in conflict-affected or high risk areas although holding great potential for development can be a cause of dispute where their revenues are fuelling the outbreak or continuation of violent conflict, undermining national endeavours towards development, good governance and the rule of law. In these areas, breaking the nexus between conflict and illegal exploitation of minerals is critical to peace and stability.
- (2) The issue concerns resource-rich regions where the challenge posed by the desire to minimise the financing of armed groups and security forces has been taken up by governments and international organisations together with business operators and civil society organisations.
- (3) The Union has been actively engaged in an Organisation for Economic Co-operation and Development (OECD) initiative to advance the responsible sourcing of minerals from conflict regions, which has resulted in a government-backed multi-stakeholder process leading to the adoption of the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Due Diligence Guidance¹) including supplements on tin, tantalum and tungsten, and on gold. In May 2011, the OECD Ministerial Council recommended to actively promote the observance of this Guidance.
- (4) The concept of responsible sourcing is referred to in the updated OECD Guidelines for Multinational Enterprises² and is in line with the United Nations (UN) Guiding Principles on Business and Human Rights³. These documents aim at advancing supply chain due diligence practices when businesses source from regions affected by conflict and instability. At the highest international level, UN Security Council Resolution

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition, OECD Publishing (OECD (2013). http://dx.doi.org/10.1787/9789264185050-en.

OECD Guidelines for Multinational Enterprises, OECD 2011 edition.

Guiding Principles on Business and Human Rights, UN Human Rights Office of the High Commissioner, New York and Geneva 2011.

- 1952 (2010) specifically targeted the Democratic Republic of Congo (the DRC) and its neighbours in Central Africa calling for supply chain due diligence to be observed; the UN Group of Experts on the DRC, following up Security Council Resolution 1952 (2010), also advocates compliance with the OECD Due Diligence Guidance.
- (5) In addition to multilateral initiatives, on 15 December 2010, the Heads of State and Government of the Great Lakes Region took a political commitment in Lusaka to fight the illegal exploitation of natural resources in the region and approved inter alia a regional certification mechanism based on the OECD Due Diligence Guidance.
- (6) The Commission in its 2008 Communication⁴ recognised that securing reliable and undistorted access to raw materials is an important factor for the EU's competitiveness. The Raw Materials Initiative (RMI) is an integrated strategy aimed at responding to different challenges related to access to non-energy non-agriculture raw materials. The RMI recognises and promotes financial as well as supply chain transparency, and the application of corporate social responsibility standards.
- On 7 October 2010, the European Parliament passed a Resolution calling for the Union to legislate along the lines of the US 'conflict minerals' law *alias* Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*; and the Commission announced in its Communications of 2011⁵ and 2012⁶ its intention to explore ways of improving transparency throughout the supply chain, including aspects of due diligence. In the latter communication and in line with the commitment it had made at the May 2011 OECD Ministerial Council, the Commission also advocated greater support for and use of the OECD Guidelines for Multinational Enterprises, and of the OECD Due Diligence Guidance even outside the OECD membership.
- (8) Union citizens and civil society actors have raised awareness with respect to companies operating under the Union's jurisdiction for not being held accountable for their potential connection to the illicit extraction and trade of minerals from conflict regions. The consequence is that such minerals, potentially present in consumer products, link consumers to conflicts outside the Union. To this end, citizens have requested, notably through petitions, that legislation be proposed to the European Parliament and the Council holding companies accountable under the Guidelines as established by the UN and OECD.
- (9) In the context of this Regulation, supply chain due diligence is an on-going, proactive and reactive process through which business operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict and adverse impacts thereof.
- (10) Third-party auditing of a company's supply chain due diligence practices ensures credibility for the benefit of downstream companies and contributes to the improvement of the upstream due diligence practices.
- (11) Public reporting by a company on its supply chain due diligence policies and practices provides the necessary transparency to generate public confidence in the measures companies are taking.
- (12) Union companies have expressed their interest through the public consultation in the responsible sourcing of minerals and reported on current industry schemes designed to

⁴ The Raw Materials Initiative – meeting our critical needs for growth and jobs in Europe, COM(2008) 699.

⁵ *Commodity markets and raw materials*, COM(2011) 25 FINAL.

⁶ *Trade, growth and development,* COM(2012) 22 FINAL.

pursue their corporate social responsibility objectives, customer requests, or the security of their supplies. However, Union companies have also reported countless difficulties in the exercise of supply chain due diligence because of lengthy and complex global supply chains involving a high number of operators that are often insufficiently aware or ethically unconcerned. The cost of responsible sourcing and their potential impact on competitiveness notably on SMEs should be monitored by the Commission.

- (13) Smelters and refiners are an important point in global mineral supply chains as they are typically the last stage in which due diligence can effectively be assured by collecting, disclosing and verifying information on the mineral's origin and chain of custody. After this stage of transformation it is often considered unfeasible to trace back the origins of minerals. A Union list of responsible smelters and refiners could therefore provide transparency and certainty to downstream companies as regards supply chain due diligence practices.
- (14) The Member State competent authorities are responsible to ensure the uniform compliance of the self-certification of responsible importers by carrying out appropriate ex-post checks so as to verify whether the self-certified responsible importers of the minerals and/or metals within the scope of the Regulation comply with the supply chain due diligence obligations. Records of such checks should be kept for at least 5 years. Member States are responsible to lay down the rules applicable to infringements of the provisions of this Regulation.
- (15) In order to ensure the proper implementation of this Regulation, implementing powers should be conferred on the Commission. The implementing powers relating to the list of responsible smelters and refiners and the list of Member State competent authorities should be exercised in accordance with Regulation (EU) No 182/2011⁷.
- (16) The Commission should report regularly to the Council and the European Parliament on the effects of the scheme. No later than three years after entering into force and every six years thereafter, the Commission should review the functioning and the effectiveness of this Regulation, including as regards the promotion of responsible sourcing of the minerals within its scope from conflict-affected and high-risk areas. The reports may be accompanied, if necessary, by appropriate legislative proposals, which may include mandatory measures,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

1. This Regulation sets up a Union system for supply chain due diligence self-certification in order to curtail opportunities for armed groups and security forces⁸ to trade in tin, tantalum and tungsten, their ores, and gold. It is designed to provide transparency and certainty as regards the supply practices of importers, smelters and refiners sourcing from conflict-affected and high-risk areas.

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Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

⁸ 'Armed groups and security forces' as defined in Annex II of the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition*, OECD Publishing (OECD (2013), http://dx.doi.org/10.1787/9789264185050-en.

2. This Regulation lays down the supply chain due diligence obligations of Union importers who choose to be self-certified as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold, as set out in Annex I.

Article 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) 'minerals' means ores and concentrates containing tin, tantalum and tungsten, and gold as set out in the Annex I;
- (b) 'metals' means metals containing or consisting of tin, tantalum, tungsten and gold as set out in the Annex I;
- (c) 'mineral supply chain' means the system of activities, organisations, actors, technology, information, resources and services involved in moving and processing the minerals from the extraction site to their incorporation in the final product;
- (d) 'chain of custody or supply chain traceability system' means a record of the sequence of entities which have custody of minerals and metals as they move through a supply chain;
- (e) 'conflict-affected and high-risk areas' means areas in a state of armed conflict, fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses;
- (f) 'downstream' means the metal supply chain from the smelters or refiners to the end use;
- (g) 'importer' means any natural or legal person declaring minerals or metals within the scope of this Regulation for release for free circulation within the meaning of Article 79 of Council Regulation (EEC) No 2913/1992⁹;
- (h) 'responsible importer' means any importer who chooses to self-certify according to the rules set out in this Regulation;
- (i) 'self-certification' means the act of declaring one's adherence to the obligations relating to management systems, risk management, third-party audits and disclosure as set out in this Regulation;
- (j) 'grievance mechanism' means an early-warning risk awareness mechanism allowing any interested party or whistle-blower to voice concerns regarding the circumstances of mineral extraction, trade, handling and export in conflict-affected and high-risk areas;
- (k) 'model supply chain policy' conforms to Annex II of the OECD Due Diligence Guidance outlining the risks of significant adverse impacts which may be associated with the extraction, trade, handling and export of minerals from conflict-affected and high risk areas;

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Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1).

- (l) 'risk management plan' means the importers' written response to the identified supply chain risks based on Annex III to the OECD Due Diligence Guidance¹⁰;
- (m) 'smelting and refining' are forms of extractive metallurgy involving processing steps with the aim to produce a metal from its ore or concentrate;
- (n) 'upstream' means the mineral supply chain from the extraction sites to the smelters or refiners, included;
- (o) 'supply chain due diligence' refers to the obligations of responsible importers of tin, tantalum and tungsten, their ores, and gold in relation to their management systems, risk management, third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high risk-areas to prevent or mitigate adverse impacts associated with their sourcing activities;
- (p) 'responsible smelters or refiners' means smelters or refiners in the supply chain of the responsible importer;
- (q) 'Member State competent authorities' means the designated one or more authorities with auditing competences and knowledge as regards raw materials and industrial processes.

Self-certification as a responsible importer

- 1. Any importer of minerals or metals within the scope of the Regulation may self-certify as responsible importer by declaring to a Member State competent authority that it adheres to the supply chain due diligence obligations set out in this Regulation. The declaration shall contain documentation in which the importer confirms its adherence to the obligations including results of the independent third-party audits carried out.
- 2. The Member State competent authorities shall carry out appropriate ex-post checks in order to ensure that self-certified responsible importers of the minerals or metals within the scope of this Regulation comply with their obligations pursuant to Articles 4, 5, 6, and 7 of this Regulation.

Article 4

Management system obligations

The responsible importer of the minerals or metals within the scope of this Regulation shall:

- (a) adopt and clearly communicate to suppliers and the public its supply chain policy for the minerals and metals potentially originating from conflict-affected and high-risk areas,
- (b) incorporate in its supply chain policy the standards against which supply chain due diligence is to be conducted consistent with the standards set forth in the model supply chain policy in Annex II to the OECD Due Diligence Guidance,

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- (c) structure its internal management systems to support supply chain due diligence by assigning responsibility to senior staff to oversee the supply chain due diligence process as well as maintain records for a minimum of 5 years,
- (d) strengthen its engagement with suppliers by incorporating its supply chain policy into contracts and agreements with suppliers consistent with Annex II to the OECD Due Diligence Guidance,
- (e) establish a company-level grievance mechanism as an early-warning risk-awareness system or provide such mechanism through collaborative arrangements with other companies or organisations, or by facilitating recourse to an external expert or body (e.g. ombudsman),
- (f) as regards minerals, operate a chain of custody or supply chain traceability system that provides, supported by documentation, the following information:
 - (i) description of the mineral, including its trade name and type,
 - (ii) name and address of the supplier to the importer,
 - (iii) country of origin of the minerals,
 - (iv) quantities and dates of extraction, expressed in volume or weight,
 - (v) when minerals originate from conflict-affected and high-risk areas, additional information, such as the mine of mineral origin; locations where minerals are consolidated, traded and processed; and taxes, fees, royalties paid, in accordance with the specific recommendations for upstream companies as set out in the OECD Due Diligence Guidance.
- (g) as regards metals, operate a chain of custody or supply chain traceability system that provides, supported by documentation, the following information:
 - (i) description of the metal, including its trade name and type,
 - (ii) name and address of the supplier to the importer,
 - (iii) name and address of the smelters or refiners in the importers' supply chain,
 - (iv) record of the smelters' or refiners' third-party audit reports,
 - (v) countries of origin of the minerals in the smelters' or refiners' supply chain.
 - (vi) when metals are based on minerals originating from conflict-affected and highrisk areas, additional information shall be provided in accordance with the specific recommendations for downstream companies set out in the OECD Due Diligence Guidance.

Risk management obligations

- 1. The responsible importer of the minerals or metals within the scope of this Regulation shall:
 - (a) identify and assess the risks of adverse impacts in its mineral supply chain on the basis of the information provided pursuant to Article 4 against the standards of its supply chain policy, consistent with Annex II and the due diligence recommendations of the OECD Due Diligence Guidance,

- (b) implement a strategy to respond to the identified risks designed so as to prevent or mitigate adverse impacts by
 - (i) reporting findings of the supply chain risk assessment to its designated senior management,
 - (ii) adopting risk management measures consistent with Annex II and the due diligence recommendations of the OECD Due Diligence Guidance, considering its ability to influence, and where necessary take steps to put pressure on suppliers who can most effectively prevent or mitigate the identified risk, by making it possible either to
 - (a) continue trade while simultaneously implementing measurable risk mitigation efforts,
 - (b) suspend trade temporarily while pursuing on-going measurable risk mitigation efforts, or
 - (c) disengage with a supplier after failed attempts at mitigation,
 - (iii) implementing the risk management plan, monitoring and tracking performance of risk mitigation efforts, reporting back to designated senior management and considering suspending or discontinuing engagement with a supplier after failed attempts at mitigation,
 - (iv) undertaking additional fact and risk assessments for risks requiring mitigation, or after a change of circumstances.
- 2. If a responsible importer pursues risk mitigation efforts while continuing trade or temporarily suspending trade, it shall consult with suppliers and affected stakeholders, including local and central government authorities, international or civil society organisations and affected third parties, and agree on a strategy for measurable risk mitigation in the risk management plan.
- 3. A responsible importer shall, in order to design conflict and high-risk sensitive strategies for mitigation in the risk management plan, rely on the measures and indicators under Annex III of the OECD Due Diligence Guidance and measure progressive improvement.

Third-party audit obligations

The responsible importer of the minerals or metals within the scope of this Regulation shall carry out audits via an independent third-party.

The independent third-party audit shall

- (a) include in the audit scope all of the responsible importer's activities, processes and systems used to implement supply chain due diligence regarding minerals or metals within the scope of the Regulation, including the responsible importer's management system, risk management, and disclosure of information,
- (b) determine as the objective of the audit the conformity of the responsible importer's supply chain due diligence practices with Articles 4, 5 and 7 of this Regulation,
- (c) respect the audit principles of independence, competence and accountability as set out in the OECD Due Diligence Guidance.

Disclosure obligations

- 1. By 31 March of each year at the latest, the responsible importer of minerals or metals within the scope of this Regulation shall submit to the Member State competent authority the following documentation covering the previous year's calendar period:
 - (a) its name, address, full contact details and a description of its commercial activities,
 - (b) a declaration of conformity with the obligations set out in Article 4, 5, 6 and 7,
 - (c) independent third-party audits carried out in accordance with Article 6 of this Regulation.
- 2. By 31 March of each year at the latest, the responsible importer of minerals within the scope of this Regulation shall submit to the Member State competent authority the documentation covering the previous year's calendar period as regards the proportion of minerals originating from conflict-affected and high-risk areas relative to the total amount of minerals purchased, as confirmed by independent third-party audits in accordance with Article 6 of this Regulation.
- 3. By 31 March of each year at the latest, the responsible importer of metals within the scope of this Regulation shall submit to the Member State competent authority the following documentation covering the previous year's calendar period:
 - (a) name and address of each of the responsible smelters or refiners in its supply chain,
 - (b) independent third-party audits regarding each of the responsible smelters or refiners in its supply chain carried out in accordance with the scope, objective and principles set out in Article 6 of the Regulation,
 - (c) the proportion of minerals originating from conflict-affected and high-risk areas relative to the total amount of minerals purchased by each of those smelters or refiners, as confirmed by independent third-party audits.
- 4. The responsible importer of minerals or metals within the scope of this Regulation shall make available to its immediate downstream purchasers all information gained and maintained pursuant to its supply chain due diligence with due regard to business confidentiality and other competitive concerns.
- 5. The responsible importer of minerals or metals within the scope of this Regulation shall publicly report as widely as possible, including on the internet and on an annual basis on its supply chain due diligence policies and practices for responsible sourcing. The report shall contain the steps taken by the responsible importer to implement the obligations as regards its management system, risk management set out in Article 4 and 5 respectively, as well as a summary report of the third-party audits, including the name of the auditor, with due regard to business confidentiality and other competitive concerns.
- 6. Within two months of reception of the submitted documentation as referred to in paragraph 1, 2 and 3 the competent authority of the Member States shall issue a notice of reception.

List of responsible smelters and refiners

- 1. On the basis of the information provided by the Member States in their reports as referred to in Article 15, the Commission shall adopt and make publicly available a decision listing the names and addresses of responsible smelters and refiners of minerals within the scope of this Regulation.
- 2. The Commission shall identify on the list referred to in paragraph 1 those responsible smelters and refiners that source at least partially from conflict-affected and high-risk areas.
- 3. The Commission shall adopt the list in accordance with the template in Annex II and the regulatory procedure referred to in Article 13(2). The OECD Secretariat shall be consulted.
- 4. The Commission shall update the information included in the list in a timely manner. The Commission shall remove from the list the names of the smelters and refiners that are no longer recognised as responsible importers by Member States in accordance with Article 14(3), or the names of the smelters and refiners in the supply chain of the no longer recognised responsible importers.

Article 9

Member State competent authorities

- 1. Each Member State shall designate one or more competent authorities in charge of the application of this Regulation.
 - Member States shall inform the Commission of the names and addresses of the competent authorities within 3 months after the entry into force of this Regulation. Member States shall inform the Commission of any changes to the names or addresses of the competent authorities.
- 2. The Commission shall make a decision to publish, including on the internet, a list of competent authorities in accordance with the template in Annex III and the regulatory procedure referred to in paragraph 2 of Article 13. The Commission shall update the list regularly.
- 3. Competent authorities shall ensure the effective and uniform implementation of this Regulation throughout the Union.

Article 10

Ex-post checks on responsible importers

- 1. The competent authorities of the Member States shall carry out appropriate ex-post checks in order to ensure whether self-certified responsible importers of minerals and metals within scope of this Regulation comply with the obligations set out in Articles 4, 5, 6 and 7.
- 2. The checks referred to in paragraph 1 shall be conducted by taking a risk-based approach. In addition, checks may be conducted when a competent authority is in possession of relevant information, including on the basis of substantiated concerns provided by third parties, concerning the compliance by a responsible importer with this Regulation.

- 3. The checks referred to in paragraph 1 shall include, inter alia:
 - (a) examination of the responsible importer's implementation of supply chain due diligence obligations including the management system, risk management, independent third-party audit and disclosure,
 - (b) examination of documentation and records that demonstrate the proper compliance with the supply chain due diligence obligations,
 - (c) examination of audit obligations in accordance with the scope, objective and principles set out in Article 6,
 - (d) on-the-spot inspections, including field audits.
- 4. Responsible importers shall offer all assistance necessary to facilitate the performance of the checks referred to in paragraph 1, notably as regards access to premises and the presentation of documentation and records.

Records of checks on responsible importers

The competent authorities shall keep records of the checks referred to in Article 10(1), indicating in particular their nature and results, as well as records of any notice of remedial action issued under Article 14(2).

Records of the competent authorities' checks shall be kept for at least 5 years.

Article 12

Cooperation between authorities

- 1. Competent authorities shall exchange information, including with their respective customs authorities, on matters pertaining to self-certification and ex-post checks carried out.
- 2. Competent authorities shall exchange information on shortcomings detected through the ex-post checks referred to in Article 10 and on the rules applicable to infringement in accordance with Article 14 with the competent authorities of other Member States and with the Commission.
- 3. Cooperation between authorities shall be in full respect of the Directive 95/46/EC and Regulation (EC) No 45/2001 on data protection and the provisions of the Council Regulation (EEC) No 2913/92 relating to the disclosure of confidential information.

Article 13

Committee procedure

- 1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
- 2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.
 - Where the opinion of the committee is to be obtained by written procedure, that procedure shall be terminated without result when, within the time-limit for delivery

of the opinion, the chair of the committee so decides or a simple majority of committee members so request.

Article 14

Rules applicable to infringement

- 1. The Member States shall lay down the rules applicable to infringements of the provisions of this Regulation.
- 2. In case of an infringement of the provisions of this Regulation, the competent authorities of Member States shall issue a notice of remedial action to be taken by the responsible importer.
- 3. In case of inadequate remedial action by the responsible importer, the competent authority shall issue to the importer a notice of non-recognition of its responsible importer certificate as regards the minerals or metals within the scope of this Regulation and inform the Commission.
- 4. The Member States shall notify the rules to the Commission and shall notify it without delay of any subsequent amendment thereto.

Article 15

Reporting and review

- 1. Member States shall submit to the Commission by 30 June of each year at the latest, a report on the implementation of this Regulation during the previous calendar year, including any information on responsible importers as set out in Article 7(1) (a), 7.2 and 7.3 (a) and (c).
- 2. On the basis of this information the Commission shall draw up a report which shall be submitted to the European Parliament and to the Council every three years.
- 3. Three years after the entry into force of this Regulation and every six years thereafter, the Commission shall review the functioning and effectiveness of this Regulation, including on the promotion and cost of responsible sourcing of the minerals within its scope from conflict-affected and high-risk areas. The Commission shall submit a review report to the European Parliament and to the Council.

Article 16

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States. Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX I

List of minerals and metals within the scope of the Regulation classified under the Combined Nomenclature

CN code	Product description
2609 00 00	Tin ores and concentrates
2611 00 00	Tungsten ores and concentrates
2615 90 00	Tantalum ores and concentrates
2616 90 00	Gold ores and concentrates
2825 90 40	Tungsten oxides and hydroxides
2849 90 30	Tungsten carbides
2849 90 50	Tantalum carbides
7108	Gold, unwrought or in semi-manufactured forms, or in powder form
8001	Tin, unwrought
8003 00 00	Tin bars, rods, profiles and wires
8007 00	Tin, other articles
8101 10 00	Tungsten, powder
8101 94 00	Tungsten, unwrought, including bars and rods obtained simply by sintering
8101 96 00	Tungsten wire
8101 99	Tungsten bars and rods, other than those obtained simply by sintering, profiles, plates, sheets, strip and foil, and other
8103 20 00	Tantalum, unwrought including bars and rods, obtained simply by sintering; powders
8103 90	Tantalum bars and rods, other than those obtained simply by sintering, profiles, wire, plates, sheets, strip and foil, and other

ANNEX II

List of responsible smelters and refiners' template referred to in Article 8

Column A: Name of smelters or refiners in alphabetical order

Column B: Address of the smelter or refiner

Column C: (*) indicator, if the smelter or refiner sources minerals originating

from conflict-affected and high-risk areas

A	В	C	

ANNEX III

List of Member State competent authorities template referred to in Article 9

Column A: Name of Member States in alphabetical order

Column B: Name of the competent authority

Column C: Address of the competent authority

A	В	C
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